

Who Actually Is Reviewing My Documents?

(And Why It Matters)

COST
CONTAINMENT
AND THE
NEED FOR
DISRUPTION IN
THE MARKET
FOR DOCUMENT
REVIEW

INTRODUCTION

E-Discovery is often the most expensive part of litigation or an investigation. Within the “e-discovery” umbrella are two components—the attorney review of electronic documents and the technology that supports that review.

The technology component—consisting of hosting, processing software, and searching technology—has seen tremendous innovation in the last decade. Sophisticated companies and software developers have flocked to this space and created real improvements to the review technology.

Where technology providers have innovated, document review providers have not. This market has lacked the creative lawyers and leaders needed to keep pace with the technology advances. That means that the most expensive part of the e-discovery cost puzzle—document review—has seen little-to-no productivity gains.

This lack of innovation frustrates clients but creates opportunity. To understand this lack of productivity gains, it is necessary to understand the market for document review, and

specifically who is reviewing the documents in these reviews. This white paper describes and compares the two primary market options for handling major document reviews. By revealing these options to be slow and stale, this white paper demonstrates how emerging market disruptors are poised to revolutionize the industry.

Much is at stake. **The document review industry is a multi-billion dollar market, and document reviews frequently cost in the millions of dollars.** CFO’s and savvy in-house counsel have a tremendous opportunity to tackle these high costs. Driving down costs while improving quality is the goal in all industries. Emerging market players, like the “Edge” team from Hilgers Graben, are doing both with document review.

MARKET DISRUPTERS ARE CHANGING THE GAME

| | LEAD FIRM | CONTRACT REVIEW SHOP | MARKET DISRUPTERS | |
|---|------------------------|--|---------------------------|------------------------------------|
| Who | Elite junior attorneys | High variance - attorneys "off the street" | Elite senior attorneys | |
| | Minimal | Minimal | Extensive | Software expertise |
| Cost | Average \$300/hr | Average \$40-50/hr or \$1/document | Average \$0.65/document | |
| | Average 60 docs/hr | Average 60 docs/hr | Typical speed 250 docs/hr | Productivity |
| Total hours to complete review | 8,300 hours | 8,300 hours | 2,000 hours | |
| | Large | Large | Small | Team size |
| Experts at review workflows and technology? | No | No | Yes | |
| | \$2.5 million | \$1 million | \$650,000 or less | Cost for 1 million document review |



Imagine this scenario: you're a CFO or General Counsel of a company. You're hit with a major lawsuit from a competitor that threatens your business, or you are faced with a government subpoena that is so broad you don't even know where to begin responding.

What's your first move?

Hire the best and brightest attorneys to represent you, of course. Spare no expense: the future of your company is on the line. Pay your attorneys to do what they do best: handle the case. They respond to subpoenas, make motions, and devise a case strategy. These are the big decisions that you are willing to pay for and they need to be done well. When you get the monthly bill, however, what accounts for the largest percentage of the bottom line? Most likely, it is not the motion practice, or case strategy, or legal research. It likely is the document review.

Why? Big litigation and investigations (and increasingly, smaller litigation) spawn the necessary evil of reviewing millions of documents spread across terabytes of electronic information. A typical government request may ask for electronic data from dozens of custodians covering a period of several years or more; that request can generate millions of potentially responsive emails, attachments, and other documents.

The mass of documents must be reviewed or considered by an attorney. While technology assists in processing and hosting, and even, to some degree, reduces the data (through de-duping or other processes), there often remains a million documents or more to be reviewed by an attorney.

This human element has created a significant ceiling to gains in efficiency, productivity, and ultimately cost savings because the review pace has not kept up with the amount of documents. An average document review pace in the 1990s was 60-70 documents per hour. It remains at about that pace today. The cost of review has skyrocketed because the review sets are often in the millions of documents.



THIS CREATES A BASIC COST EQUATION:¹

DOCUMENTS TO REVIEW / REVIEW SPEED

(x) HOURLY RATE

(=) TOTAL COST

Savvy in-house counsel and CFOs understand that the biggest expenses offer the biggest opportunity for cost savings.²

This is the basic cost equation for document review and it reveals a simple truth: review speed matters to overall cost. If it is an important variable why have review speeds remained flat? To understand why you need to understand the *two primary options* when it comes to document review, both of which have been around for years and neither of which have seen much innovation or disruption. This white paper describes both, looking at three different inputs (the background and talent of the attorneys, their training and experience, and their hourly rate) and the general outputs of their work (cost, timeliness, and quality). This discussion reveals the opportunities for improvement, and shows how emerging market players are seizing these opportunities.

1) There are more sophisticated cost equations that market disrupters can use to help understand the variables that impact the cost of document review from beginning to end.

2) In order to reduce costs, the market has focused on two of the variables in this cost equation—the number of documents to review and the hourly rate. There are limits to how far these variables can be lowered, however. Despite technological advances and the ability to trim some duplicative or clearly irrelevant documents through technology, the mass of to-be-reviewed documents on major matters remains high—often over 1 million documents. And there is a limit to how far the hourly rate for a document review can be lowered—the industry has reduced in some cases the amount paid to document reviewers to under \$25/hour. At some point the cost savings from that front-end cost reduction is lost through decreased efficiency and reduced quality of the review.



THE TRADITIONAL OPTION:

Using Attorneys From Your Lead Counsel

This white paper focuses on three inputs that the market options provide: talent and background of the reviewers (i.e., the “who”), the training and experience of those reviewers, and the hourly rate for those reviewers. The white paper then explores three critical outputs—overall cost, productivity (i.e., speed of review), and the quality of the review.

INPUT #1

Who?

At your chosen lead counsel's office, the attorneys have excellent credentials and manage your case very well. They are the best of the best. A number of junior attorneys likely help these central players with the day to day work. These attorneys have graduated from top law schools, where they excelled; they have participated in law journal work, and many have held prestigious clerkships prior to joining the firm. They are the best and the brightest, and they are there to learn how to be litigators. In ten years, these junior attorneys will evolve into the partners who handle your case.

INPUT #2

Document Review-Specific Training and Experience?

Junior associates are supremely talented but lack training and experience critical to an efficient and lower cost document review. The impact of training and experience on efficiency is seen throughout legal practice; a senior attorney might take only 30 minutes to research a question that would take a first year attorney 3 hours to answer. The same holds true for a document reviewer—so long as they are properly trained and pushed to advance their skills.

What kind of training do junior attorneys receive? It typically is not on the advanced aspects of document review. The firms employing these attorneys want them to be great litigators and trial attorneys, not necessarily great document reviewers. The day to day work performed by junior attorneys is on other tasks: researching case law to support the position being taken by the client, drafting, proofreading, and/or cite checking court papers, interviewing witnesses, and the like. As they develop in their profession, they will take on more and more significant tasks. This kind of work is crucial to their development as litigators, and these top-notch young attorneys are very good at what they do.

These junior attorneys also lack the teacher of deep, applied experience. It is common for an associate to work on a review or two or three in their career, but in a few short years—as their careers advance and their hourly rates make it hard to justify document review work—they will breathe a sigh of relief as they focus on more substantive work and the mundane task of document review falls to a new crew of young lawyers.



So, while these junior attorneys are certainly capable of performing excellent document review work, their personal career objectives and the skills that their prestigious BigLaw employers cultivate in them are not aligned with the development of skills that optimize accuracy and efficiency in the performance of document review. **You might hire a skilled architect to design your house—even one with expertise in, for example, electrical design—but that architect's skill set probably does not make him the best person to install that electrical system.**

INPUT #3

Hourly Rate

Here, talented junior attorneys are not cheap. A junior associate bills at an industry average rate of around \$300 hourly.¹

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Savvy in-house counsel and CFOs are primarily concerned with the bottom line: what is the overall cost of the document review, and what quality are you able to achieve for the cost? In addition, timeliness of completion affects the bottom line. Let's assess these variables in a document review performed by junior associates at a large law firm.

OUTPUT #1

Productivity?

A critical and under-appreciated output metric is **productivity**: How quickly can you complete the review? Productivity plays an important role in determining total cost—as we see in the cost equation, the faster you review documents (at an hourly rate), the fewer hours you spend on a review and the less money you spend. This fact implies that even a higher hourly rate could lead to an overall lower cost if it was offset by even bigger productivity gains.

1) Stickler, Andrew, "BigLaw Hourly Rates Dwarf Rivals' Across The Board" (May 28, 2014). <https://www.law360.com/articles/541772/biglaw-hourly-rates-dwarf-rivals-across-the-board>; National Law Journal, "Billing Rates Across the Country" (January 13, 2014). <http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country>



Productivity is also important to the case because it determines the speed at which the review can be completed. Reviews are not handled in a vacuum. Cases have deadlines, whether by the federal rules, a court order, or a deadline imposed by the government. Time-to-completion matters for the defense or prosecution of the case; the lead trial team needs to know what documents exist as it analyzes its defenses, arguments, and possible settlement.

So how do junior associates compare? Despite the talent implied by a higher hourly rate, there is no increase in review speeds. The industry average is roughly 60 documents/hour, and junior associates do not generally perform better than the industry average. Looking at our cost equation, 60 documents/hour simply puts a ceiling on the amount of possible cost savings. It also limits the speed in which the total review can be completed. One associate working 60 hours per week on the review would take nearly 3 years to complete just the first-pass of this review. Need it done in six months? That means at least 9 people. That is simply not realistic for the firm or the client.

OUTPUT # 2

Total Cost?

This is a critical output of the review—how much does it cost?

As we have seen, junior associate billing rates are high. But without an increase in productivity, this has an expected impact on the total cost.

| DOCUMENTS TO REVIEW | REVIEW SPEED | (x) HOURLY RATE | (=) TOTAL COST |
|---------------------|--------------|-----------------|----------------|
| 500,000* | 60 | \$300 | 2.5 MILLION |

In this example, the review cost reaches \$2.5 million. That's just for the attorney time on the review, and not the technology before you account for the costs of supporting your review, such as hosting, processing, and software licenses.

* This example assumes an initial data set of 1,000,000 documents. Basic software features, such as de-duping and threading, typically reduce the data set by about 50%, leaving 500,000 documents to be reviewed by attorneys.



Quality?

A third critical output is quality of your review. Less amenable to precise tracking, quality can still be judged by assessing the level of consistency among reviewers and the number of mistakes discovered later in the process. A few broad statements can be made:

The larger your review team, the more communication that must occur among team members to transmit instructions and feedback. At \$300/hour, that extra communication can be very costly. And the larger the team, the greater the risk of inconsistent coding.

Training matters, and junior associates do not generally get rigorous training on the sophisticated document review tools. The less a reviewer knows the software, the more likely it is that mistakes can be made.

The less time a reviewer can devote to focused, concentrated review—uninterrupted by more substantive work—the lower the quality of the review.

Junior attorneys are still just that—junior. They may not have gone to trial yet, argued motions or attended hearings, or seen a case all the way from the beginning to the end.

Without having the experience of a senior attorney, they may not always know what to look for, or understand what is important, or appreciate the nuance between various documents and arguments in the case.

The bottom line is that junior attorneys, despite their talent and pedigree, have significant demands on their time, can be pulled from their document review projects to more pressing work, have a harder time applying long stretches of uninterrupted work, and generally do not have the end-to-end litigation experience of other more senior attorneys. These drive down quality and increase costs.



Other Considerations.

For simplicity, we have focused this example on just the first-pass review. But document review is not a one-step process. Usually, there is a first-pass review, in which documents are merely coded as relevant or not. In a typical scenario, the first-pass review might narrow the data set by 40%, reducing the data set further to 200,000. But this remaining data must go through a second-pass review, in which each document is tagged for its relevance to various issues in the case, for privilege, and the most crucial documents are flagged for analysis by senior attorneys on the case. Prior to production, necessary redactions must be undertaken and a quality control process is applied. All of these additional steps require time and expense as well.

VERDICT:

Junior attorneys, despite their talent and pedigree, impact the cost equation one way—high hourly rates drive up the overall cost of the review significantly. Additionally, efficiency gains made possible by emerging technology cannot be fully leveraged by junior attorneys whose objective is to develop the skills of a lead litigator, not to learn the most effective ways to navigate document review software tools.

The high cost of using junior associates at large law firms caused the market to respond with the only other major market option—contract document reviewers.

“efficiency gains made possible by emerging technology cannot be fully leveraged by junior attorneys whose objective is to develop the skills of a lead litigator, not to learn the most effective ways to navigate document review software tools.”



OPTION TWO:

Contract Reviewers

The second common option when embarking on a document review is to go outside of the lead counsel's firm and engage contract reviewers.

There are two primary issues that drive work to contract reviewers. The first one is size of the review—lead counsel might suggest this option when there is a document review so large that lead counsel cannot staff it. There are reviews that sometimes need dozens of attorneys, and large firms often do not have the attorney-power to handle those reviews.

The second is a cost control measure, often at the behest of the client.

There is an enormous number of companies that source contract reviewers. Many document review vendors offer “managed review” services in which they engage contract reviewers to perform document review.

Let us look at this provider market.

INPUT #1

Who?

In the previous examples, our reviewers were graduates of top law schools, worked at a prestigious clerkship, or otherwise excelled in law school. That is typically not the case for contract attorneys. In many cases the reviewer is essentially a temp attorney, often responding to an internet ad, such as this one:

[Firm Name Withheld] is seeking 20 licensed contract attorneys for an upcoming document review.

- Attorneys must in good standing and licensed in any U.S. jurisdiction
 - 40 hours a week; overtime, paid at the straight time/hourly rate
 - Rate: \$29.00/hr.
 - The review will be located in the [location withheld]
 - The review is duration is estimated to be 3 weeks (possibly longer)

Please submit your resume to [contact withheld].

This is an actual ad, placed by an actual “big-name” document review vendor that offers managed review services. **Who are these reviewers? As a client, you really don't know.** Yes, they have a law degree and are licensed to practice law somewhere, and the document review vendors will tout this as a measure of credibility. But let's compare the lawyer who answers this ad, who is willing to work for \$29 hourly, to the big firm attorney who often makes in excess of \$150,000 annually. What kind



of quality reviewer is being attracted at this rate? Did the lawyers excel in law school? Do they perform reviews full time? Have they ever used review software before and are they invested in learning everything about it? Are they between jobs? Are they good? Motivated? Display excellent attention to detail? Work well with others? Communicate well?

All of these factors, and many others, play a significant role to both the quality of the review and the overall costs. While law firms have strong filtering mechanisms by which they identify talent, managed review vendors typically do not. They need bodies on quick notice and it is difficult to produce an army of reviewers with a known and consistent quality.

INPUT #2

Training and Expertise?

The same problem with junior associates—lack of training and expertise with review workflows and software—exists here. Contract attorneys and their employers generally do not have incentive to become more efficient. They both tend to be paid hourly. Consider a review of 1000 documents. If the reviewer develops workflows or other mastery to increase her review speed to 200 documents/hour, she does so by reducing her (and her employer's) compensation. This simply is an incentive not to innovate.

Regarding experience, contract reviewers work on more reviews but do not have the type of experience that tends to generate efficiencies and reduced cost.

In part this is because contract reviewers are often not given the responsibility of reviewing for substance. They review simply whether a document is “responsive” or “relevant”, but not how the document is relevant to the arguments of the case. Is it privileged? Does it relate to particular claims (e.g., unjust enrichment, tortious interference) or a particular element of the claim (e.g., was there intent or knowledge).

Contract reviewers typically work in large teams run by a single project manager, and operate under strict guidelines intended to promote consistency among the multitude of reviewers with uncertain backgrounds who have never worked together before. While ESI guidelines do serve as some level of quality control, they also restrict the potential for developing innovative workflows that can vastly increase productivity.



INPUT #3

Hourly Rate

In comparing hourly rates, contract reviewers are far better. They average around \$40-50/hour, much less than a junior associate billing rate.

Let's look at the three critical output metrics as applied to a team of contract reviewers.

They average around \$40-50/hour, much less than a junior associate billing rate.

OUTPUT #1

Productivity?

Analyzing productivity is straightforward. The typical contract reviewer hits the same industry average of around 60 documents/hour. One advantage of a dedicated review team is that they do nothing but perform your review, full time, until it is done. In addition, if the review needs to be done quickly a large amount of reviewers can be hired to complete the job. While this may impact quality, the contract review providers are not constrained by the number of personnel in the same way that a law firm is.

OUTPUT #2

Total Cost?

Cost, at least as an initial matter, is an improvement over junior associates because of the hourly rates – \$40 beats \$300. Sometimes managed review services bill hourly, just like law firms. In an effort to tout cost savings and appeal to clients' desire for predictable budgets, it is becoming more common for managed review services to offer flat fee pricing. The industry standard is \$1 per document, calculated before application of any software features to reduce the data set. Therefore, review of a 1,000,000 document data set by a managed review service costs \$1 million, a more than 50% savings over review by lead counsel.



But upon further inspection, that cost savings breaks down. A review is not a simple, one-pass process; it must go through its various stages. Review teams filled with temporary attorneys with an unproven history with the team usually are not entrusted with anything beyond first-pass review, the initial determination of relevant vs. irrelevant. ***In our example, after a first-pass review by contract attorneys, 200,000 documents will now be passed back to young junior associates at the lead law firm, to review for substance at a rate of \$300 hourly.*** The client has saved on first-pass review, only to land in the same place for second-pass review. By splitting the two teams, the cost and inconsistencies increase. Junior associates are still not invested in learning the best use of review software, and are beginning second-pass review with no institutional knowledge of the data set gained by the contract lawyers during first-pass review. In addition, the multiple levels of communication, both amongst the large number of temp attorneys and between the temp reviewers and the lead law firms, creates additional breakdowns and inefficiencies. The process is thus slowed, any savings accumulated may be eaten away, and the same problems noted above apply when the review moves into its second stage.

The end result is that the review is still expensive. In our example, that amounts to at least \$1 million. As we see below, innovators and market disruptors are beating these costs.

| DOCUMENTS TO REVIEW | (=) TOTAL COST |
|---------------------|----------------|
| 1,000,000 | 1 MILLION |



Quality?

What about **quality**? Although the document review vendors employ project managers to oversee each review, the individuals performing the review are independent contractors.

Beyond the uncertainty of who is actually performing your review, the same quality control risks apply. Large teams require large amounts of communication to run a review. And the more individuals you have performing a review, the more risk of inconsistent coding you introduce.

Quality control in document review is clearly the biggest concern in the contract reviewer marketplace. This fact becomes abundantly clear upon close inspection of the features that are being introduced into review software. One software developer touted its features by saying “because, let’s face it, some lawyers are dumb.” Features most often touted by document review software developers include those that can recognize reviewers on a team whose pace or accuracy falls below expectations.

Responding to marketplace demands, innovations in review software tend to compensate for reviewers’ lack of skills more so than complement and enhance an expert reviewer’s productivity.

THE VERDICT:

While cheaper on an hourly basis than junior attorneys at large firms, the cost savings generated by contract reviewers quickly get devoured through quality control measures and second-pass review.

So where can gains be made? Our cost equation tells us that productivity gains can lower costs. Our knowledge of the review process tells us that smaller teams, increased communication, and having one team handle first/second-pass review leads to lowered costs as well.

Can these gains be achieved? The answer is: yes. There are market disrupters doing this right now, today, creating 5x or greater productivity gains and reducing costs for clients. Let’s see what those teams look like.



THREE:

Market Disruptors Change the Game

There is a new emerging market of dedicated discovery teams that are changing the face of legal document review. The cumbersome yet necessary process of reviewing documents is long overdue for an overhaul, and like any major industry shift, it is happening first in bits and pieces, but the sea change is just around the corner.

Dedicated discovery teams can greatly improve the cost, timeliness, and quality of the document review process. Hilgers Graben's document review team—its "Edge" team—is one example of a game-changing market disruptor. Let's explore this team's history to understand how HG Edge and other teams like it are transforming the marketplace.

The HG Edge team is made up of lawyers who, like the associates at the big firms we saw above, have elite talent: they attended top schools, achieved top marks, held law journal board positions and prestigious court clerk positions, and were trained at the biggest and best law firms in the country. Members have worked in big firms on large litigation matters, and have a deep understanding of what the lead counsel needs in order to run an effective defense. They bring this unique experience to the table in every review they perform.

Talent, however, is just part of the equation. These teams build on that foundation in a number of ways. First, improvements begin with an expert grasp and use of software technologies. The Edge team has spent the last 5 years learning the nuances of a variety of available review software tools, and has fine-tuned their workflows to take advantage of the software's capabilities.

Second, the team has developed proprietary workflows that greatly enhance the efficiency and quality of the review. Each member of the team has firsthand experience with the inefficiencies of traditional methods for document review, and a vision of how the process can be vastly improved. Over time, and in the crucible of high-stakes reviews, the team has developed techniques and process improvements that make for a more efficient review with a higher level of quality.

Third, the relatively small size of the team greatly enhances communication, reducing cost and inefficiencies while providing the lead trial team with the information it needs. The HG Edge team was built on elite team members and not an army of temporary attorneys, and the team has been working together for years. Little communication is needed to get a review up and running and fewer reviewers means fewer inconsistencies.

Edge, and other teams like it, can work hand-in-glove with lead counsel to provide unparalleled service to clients at a reasonable cost.



Reduced inconsistencies and vastly improved efficiency through the effective use of available software means the quality of your review is maximized. What about cost and productivity? The Edge team at Hilgers Graben has tracked these metrics, and the record speaks for itself:

- In expedited review in a bet-the-company case, the Edge team handled the first- and second-pass review for **30 cents/document**—a 70%+ savings over what you would see from a review shop.
- In a recent first-pass review, the team hit average review speeds of over 200 documents/hour in an email-intensive review.

The savings don't stop with first-pass review. ***When you engage a dedicated discovery team to handle the document review portion of the case, you hire a group of professionals who are also capable of evaluating the data set for the so-called second-pass review***—that is, analysis as to how the documents relate to the case, analysis for privilege, and like items. The Edge team can apply the institutional knowledge gained during first-pass review to make second-pass review even faster and more efficient because the team already has a head of steam on the case. The potential for savings during second-pass review is even greater than that achieved in first-pass review.

Because the Edge team has real litigation experience, as well as the ability to understand the nuances of the business and the defense strategy, they are able to form a unique partnership with lead counsel. Edge, and other market disruptors like them, can offer layered services to provide to the lead counsel's team anything its lawyers may need, for example: reports on the contents of the entire data set; graphic representation of documents by issue, date, custodian, or other metrics; detailed analysis of useful documents found in the set; timelines, deposition prep binders, and immediate reports on any documents that may be crucial to the case.

Edge, and other teams like it, can work hand-in-glove with lead counsel to provide high-value service to clients at a reasonable cost. Identifying the team as a "market disruptor" may even be a bit of a misnomer. The Edge team does not challenge or take the place of existing services; the Edge team enhances what lead counsel has to offer by improving quality and reducing cost to client. The talented lawyers on the trial team are relieved of the burden of performing a task that they are not set up to do efficiently. They can focus on the valuable tasks that they can do impeccably, and in the process provide not only better client service, but also better training to young associates.



If you are a smart and savvy CFO or in-house counsel, you may be scratching your head. Can you expect this kind of savings and results for your case? Each review is different, and various variables can slow down a review—for example, large excel spreadsheets, emails, and confidential information-heavy documents (e.g., consumer information or that protected by HIPPA). However, the Edge team is so confident in our ability to produce tremendous cost savings that we offer flat-fee pricing. The precise per-document cost is determined after an initial consultation and assessment of our client's specific data set. That means no guesswork for the CFO: you will know up front exactly how much first-pass review of your documents will

While each review may vary, there is no catch. Dedicated discovery teams are doing in the document review market what talented, innovative, teams assisted by technology are doing in industries across the map. They are just now applying them in an arena that has been neglected for 20 years. As this marketplace evolves, the development of software innovations will likely trend away from compensating for lack of skills and back toward a focus on features that complement the capacity of a knowledgeable reviewer. The capability is there, and the experts who can harness that possibility are beginning to emerge in this market.

The market is changing. To date, the change is happening in little chips. But as Edge and other market disruptors continue to emerge, refine their processes, and establish traction in this changing marketplace, it is only a matter of time until the dam breaks. As a smart and savvy CFO or in-house counsel, is your outside counsel a visionary who will embrace new and more effective document management practices? There is no time like the present to find out.



THE EDGE TEAM CAN HELP YOU SAVE ON YOUR NEXT DOCUMENT REVIEW

- Experienced document review teams
- Proprietary work flows
- First- and Second-pass review that works hand-in-glove with trial team
- Up to 70% less than traditional document review with higher quality and faster turn around

To learn more about how the market disrupters at Hilgers Graben can help you save cost on your next document review, call **402-218-2106** or email us at **info@hilgersgraben.com**

